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No. 06-43

In The
Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,

Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. AND MOTOROLA, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AFTER THE FILING DEADLINE AND BRIEF *AMICI CURIAE* OF THE HONORABLE JOHN CONYERS, JR. AND BARNEY FRANK, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AFTER THE FILING DEADLINE

Pursuant to Supreme Court Rule 37.3, the Honorable John Conyers, Jr. and Barney Frank, members of the United States House of Representatives and, respectively, the Chairman of the House Committee on the Judiciary and the Chairman of the House Committee on Financial Services, respectfully move the Court for leave to file the brief that follows after the deadline for filing *amicus* briefs supporting Petitioner (June 11, 2007). *Amici* apologize for the late brief. *Amici* had expected the Solicitor General to accept the recommendation of the Securities and Exchange Commission that the United States file an *amicus* brief in support of Petitioner to urge the Court to follow the Commission's long-standing interpretation of the statutory and regulatory provisions at issue in this case. The Solicitor General's decision to follow the political and policy directives of the President rather than to support the Commission's legal position, coupled with testimony by Commission Chairman Cox at a June 26, 2007 oversight hearing before the Committee on Financial Services, has persuaded *amici* of the critical need to give voice to the points made in their brief.

Petitioner's blanket consent to the filing of *amicus* briefs in support of either party or neither party has been filed with the Clerk of the Court, and Petitioner has granted consent to the filing of this brief out of time. Respondents do not object to the filing of this brief. Since Respondents have been granted an extension of time to file

their brief until August 15, 2007, the granting of this motion would not prejudice them.

Respectfully submitted,

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BRIEF OF THE HONORABLE JOHN CONYERS, JR. AND BARNEY FRANK, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, The Honorable John Conyers, Jr. and Barney Frank, respectfully submit this brief *amici curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

Amici are the Honorable John Conyers, Jr., a member of the United States House of Representatives and the Chairman of the House Committee on the Judiciary, and the Honorable Barney Frank, a member of the United States House of Representatives and the Chairman of the House Committee on Financial Services. Both *amici* file this brief in their official capacities as committee chairmen.

The Committee on the Judiciary has jurisdiction over the federal courts and the Department of Justice. The Department of Justice is responsible, among other things, for the criminal prosecution of the anti-fraud provisions of

[1] Pursuant to Rule 37.6 of the Rules of this Court, Petitioner's consent to the filing of *amicus* briefs is on file with the Clerk of Court. Petitioner has consented to the filing of this brief out of time. Respondents do not object to the filing of this brief. This brief was not authored, in whole or in part, by counsel for either party. Matthew Wiener of the law firm of Cuneo Gilbert & LaDuca, LLP – counsel of record for AARP, Consumer Federation of America, and U.S. PIRG in submitting a separate *amicus* in support of Petitioner in this case – and Jonathan W. Cuneo, Pamela Gilbert and Michael Lenett of that firm assisted in the preparation of this brief, as did Deborah Silberman and Joshua Kotin of the House Committee on Financial Services. No person other than *amici* contributed monetarily to the preparation or submission of this brief.

the federal securities laws. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights*, No. 06-484, slip op. at 1, 168 L. Ed. 2d 179 (2007).

The Committee on Financial Services has jurisdiction over the federal laws that regulate the nation's capital markets – including the statute at issue in this case, the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (Exchange Act) – and it has legislative oversight authority over the Securities and Exchange Commission (Commission), which is responsible, among other things, for the civil enforcement of the Exchange Act's anti-fraud provision. *See, e.g.*, *Tellabs*, slip op. at 1.

Amici play a significant role in the development of federal securities law and in the operation of the federal courts and, therefore, have an interest in the means by which the anti-fraud provisions of the federal securities laws are applied by the courts. *Amici* have an interest in the proper differentiation of constitutional responsibilities among the Executive, the Congress and this Court and wish to bring certain information to the attention of the Court.

SUMMARY OF ARGUMENT

The interpretation of Section 10(b) and Rule 10b-5 adopted by the Court of Appeals and urged by Respondents ultimately rests on policy considerations at odds with the statutory text that should more appropriately be addressed to Congress than to this Court. In its merits brief, Petitioner argues that the conduct at issue is prohibited by the plain language of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and its companion Commission

regulation, Rule 10b-5, 17 C.F.R. § 240.10b-5, and urges that any change to the substantive law should be made by legislative action and not by the courts. This contention is correct.

ARGUMENT

Amici are mindful of the Court's admonition that *amici* raise only relevant matters not already brought to the attention of the Court by the parties, *see* SUP. CT. R. 37.1. Therefore the focus of this brief is to clarify the role of Congress and the relationship among the Executive, the Congress and the Court in seeking to alter the scope of the anti-fraud provisions of the Exchange Act. Section 10(b) of the Exchange Act makes it unlawful for "any person, directly or indirectly" to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b).

Section 10(b) of the Exchange Act and Commission Rule 10b-5 (in particular, subsections (a) and (c)) proscribe conduct of the sort alleged in Petitioner's complaint and by plaintiffs in other prominent securities fraud cases to have come before the federal courts. *See, e.g.*, *Regents of the Univ. of California v. Credit Suisse First Boston (USA)*, 482 F.3d 372, 392-93 (5th Cir. 2007), *sub nom. The Regents of the Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., pet. for cert. filed* (Apr. 5, 2007) (No. 06-1341). The Court of Appeals' interpretation of the law in this case runs directly counter to a plain reading of the statute.

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security . . . , any manipulative or

deceptive device or contrivance in contravention of" such rules and regulations as the Commission may find are "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). Rule 10b-5, promulgated under this provision, forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates . . . as a fraud or deceit."

As the Commission pointed out in its brief *amicus curiae* in support of positions that favor petitioner, *Simpson v. Homestore, Inc.*, No. 04-55665 (9th Cir. Oct. 22, 2004), *available at* www.sec.gov/litigation/briefs/homestore_102104.pdf, this Court has stated repeatedly that Section 10(b) should be construed "'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972), quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)); *accord Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971); *see also Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977) ("No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices.").

This Court also has stated its belief that "§ 10 (b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws." *Bankers Life*, 404 U.S. at 11 n.7 (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)); *see also*

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 (1976) (stating that Section 10(b) is "a 'catchall' clause to enable the Commission 'to deal with new manipulative (or cunning) devices.'").

As a whole, Rule 10b-5 encompasses all of the authority granted to the Commission in Section 10(b). *See Zandford*, 535 U.S. at 816, n.1 ("The scope of Rule 10b-5 is coextensive with the coverage of § 10(b). . . ."). Thus, if conduct is covered by Rule 10b-5, it is necessarily covered by Section 10(b). Rule 10b-5 should be afforded controlling weight. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (upholding EPA's construction of Clean Air Act term "stationary source").

The Commission has been consistent in its support for the proposition that, under appropriate circumstances, a defendant who committed deceptive acts as a part of a scheme to defraud investors may be liable under Rule 10b-5, even if that defendant did not directly issue fraudulent statements. The Court can find a well-articulated statement of the Commission's position in its *amicus* briefs in the *Simpson v. Homestore, Inc.* case, *supra*.

Commission Chairman Christopher Cox recently testified before the House Financial Services Committee that, at the recommendation of staff and following a three to two vote of the Commissioners, the Commission recommended to the Solicitor General of the United States that he file an *amicus* brief in support of Petitioners. *See* Excerpts from Hearing on Review of Investor Protection and Market Oversight with the Five Commissioners of the Securities and Exchange Commission Before the House Comm. on Financial Services, 110th Cong., 1st Sess., June

26, 2007 (consisting of complete text of questions and answers cited or quoted in Brief) (CQ Transcriptions, Inc.), at App. 3. In response to a request by Representative Deborah Pryce for comment on the *Stoneridge* case (*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*), Chairman Cox noted that the *Stoneridge* case was on all fours with the 2004 *Homestore* case, in which the Commission voted unanimously to file an *amicus* brief. He made the astute point that "[l]aw has to have some objective meaning. It can't be just a question of how we all feel about it" and that laws should not be so "effervescent as to change with" the change in political composition of the Commission. *Id.* at App. 4.

In response to later questioning about the Commission's decision to recommend that the Solicitor General file a brief in support of Petitioner, Chairman Cox said:

> And so I did not reflexively follow the unanimous decision of 2004, but rather looked carefully at what was before me. . . . What is going on in that case, though is that we are focused on when conduct is fraudulent, and whether conduct can be fraudulent. I think the commissioners believe it can. And also the circumstances of a particular case and whether or not that case should go forward.

Id. at App. 6.

The Solicitor General rejected the Commission's specific recommendation that the United States file an *amicus* brief in support of Petitioner and urge the Court to follow the Commission's long-standing interpretation of the statutory and regulatory provisions at issue. Disturbingly, this appears to have been done as a result of White House intervention. Allan Hubbard, director of the President's National Economic Council, told reporters on a

conference call on June 12, 2007 that the President personally weighed in with his view that it is important to reduce unnecessary lawsuits and that federal securities regulators are in the best position to sue. *See* Marcy Gordon and Pete Yost, *Bush Gave Policy Views on Top Court Case,* ASSOC. PRESS NEWSWIRES, June 12, 2007. Mr. Hubbard said "[w]e are a society that is overly litigious. And that is very harmful for our economy and very harmful for investors." According to Mr. Hubbard, the President's policy views were conveyed to the Solicitor General by Deputy White House counsel William Kelley. "On the policy matter, there was a difference of opinion that was in the administration. Ultimately, the president makes up his own mind. He shared his opinion with the solicitor general." *Id. See also* Greg Stohr, *Bush Administration Rebuffs Investors at High Court,* BLOOMBERG, June 12, 2007.

The Solicitor General's decision to follow the political and policy directives of the President rather than to support the Commission's legal position plots a dangerous course that has persuaded *amici* of the critical need to bring these developments to the Court's attention.

A number of commentators have called for the Court to decide this case by reference to policy considerations nowhere found in the statute. *See, e.g.*, Ted Frank, *Arbitrary and Unfair*, WALL ST. J., May 31, 2007, at A-14. No doubt Respondents and many of their supporting *amici* will ask the Court to substitute one policy argument or another in lieu of the clear statutory text, much as several lower courts have done in rejecting scheme liability. *See, e.g.*, *Credit Suisse First Boston*, 482 F.3d at 392-93 (5th Cir. 2007); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. and Motorola, Inc. (In re: Charter Communications, Inc. v. Stoneridge Investment Partners, LLC)*, 443

F.3d 987, 992-93 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1873 (U.S. Mar. 26, 2007) (No. 06-43). That will be an invitation to engage in precisely the sort of policy-based judicial activism this Court has repeatedly condemned in statutory interpretation cases. *See, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 720-21 (2001) (Scalia, J.).

The separate powers created by the Constitution invest the different branches of government with distinct roles delegated to them by the Constitution. It is not for the Executive or the Judicial branches of our government to formulate legislative policies; that function is the exclusive province of the Congress. *See Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 194 (1978). It is then for the Executive to administer the laws and for the courts to enforce them. *Id.* The branch of government to which Respondents and their *amici* should direct their policy arguments is Congress. The Committee on Financial Services of the U.S. House of Representatives stands ready to facilitate through hearings a discussion of whether to amend Section 10(b) to immunize from liability persons who knowingly engage, directly or indirectly, through conduct or speech, in manipulative or deceptive acts as a part of a scheme to defraud investors.

Unless and until Congress so amends Section 10(b), however, the Court should honor the legislative policies established by the Congress reflected in the clear language of the statute, and as reflected in the Commission's rules, as well as this Court's precedents. That outcome, we respectfully submit, compels the reversal of the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals.

Regardless of the rule announced in this case, Congress will continue to revisit and review the federal securities laws when necessary. Any congressional action will take place within the structure and with the powers defined by the Constitution. Congress has the constitutional authority and the institutional ability to consider fully the policy interests and the public interests that are implicated in this case.

Respectfully submitted,

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July 30, 2007
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APPENDIX A

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REP. BARNEY FRANK HOLDS A HEARING ON THE SECURITIES AND EXCHANGE COMMISSION – COMMITTEE HEARING

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(CORRECTED COPY: CORRECTS SPEAKERS LIST)

HOUSE COMMITTEE ON FINANCIAL SERVICES HOLDS A HEARING ON THE SECURITIES AND EXCHANGE COMMISSION

JUNE 26, 2007

SPEAKERS: REP. BARNEY FRANK, D-MASS. CHAIRMAN REP. PAUL E. KANJORSKI, D-PA. REP. MAXINE WATERS, D-CALIF. REP. CAROLYN B. MALONEY, D-N.Y. REP. LUIS V. GUTIERREZ, D-ILL. REP. NYDIA M. VELAZQUEZ, D-N.Y. REP. MELVIN WATT, D-N.C. REP. GARY L. ACKERMAN, D-N.Y. REP. JULIA CARSON, D-IND. REP. BRAD SHERMAN, D-CALIF. REP. GREGORY W. MEEKS, D-N.Y. REP. DENNIS MOORE, D-KAN. REP. MICHAEL E. CAPUANO, D-MASS. REP. RUBEN HINOJOSA, D-TEXAS REP. WILLIAM LACY CLAY, D-MO. REP. CAROLYN MCCARTHY, D-N.Y. REP. JOE BACA, D-CALIF. REP. STEPHEN F. LYNCH, D-MASS. REP. BRAD MILLER, D-N.C. REP. DAVID SCOTT, D-GA. REP. AL GREEN, D-TEXAS REP. EMANUEL CLEAVER II, D-MO. REP. MELISSA BEAN, D-ILL. REP. GWEN MOORE, D-WISC. REP. LINCOLN DAVIS, D-TENN. REP. ALBIO SIRES, D-N.J. REP. PAUL W. HODES, D-N.H. REP. KEITH ELLISON, D-MINN. REP. RON KLEIN, D-FLA. REP. TIM MAHONEY, D-FLA. REP. CHARLIE WILSON, D-OHIO REP. ED PERLMUTTER, D-COLO.

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WITNESSES: CHRISTOPHER COX, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

PAUL ATKINS, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION

ROEL CAMPOS, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION

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KATHLEEN CASEY, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION

[*] FRANK: The hearing of the Committee on Financial Services will convene. I am very pleased, along with the ranking members and the others, to welcome all five commissioners.

* * *

PRYCE: Real time? All right. Thank you. Would you like to comment at all – in some of the opening statements, we heard mention of the amicus brief filed by the SEC. My time's expired?

FRANK: Yes, but make it the last question, and get a quick answer.

PRYCE: It's the last question. Do you want to comment on that now? Or would you rather have a more pointed question?

COX: Well, I need a more pointed question just to know which amicus brief you're talking about.

FRANK: Go ahead and point.

PRYCE: All right. The Stoneridge case amicus brief. Thank you.

COX: All right. The Stoneridge case – and you can get a variety of opinions here, because as you know that was three-to-two vote. But the Stoneridge case was very similar to a prior case that the SEC had considered in 2004 called Homestore. It was my view, and it is my view generally with respect to decisions that are recently taken by the SEC, that precedent matters. And because Homestore and Stoneridge were very much on all fours with one another, I thought it important for the SEC to be consistent and be clear on these points.

As I mentioned in my opening statement, I don't believe that SEC rules or policies and so on should be so effervescent as to change with one or two people coming on board. It would be awfully nice if the regulatory process were sufficiently transparent that people would know what to expect. And I think this is doubly so when what we're doing is trying to interpret law, what law means. Law has to have some objective meaning. It can't be just a question of how we all feel about it.

So the SEC, having voted in 2004, just one year before I arrived on this very point, I thought it important for us to be consistent. And I should point out that that 2004 vote was not a three-to-two vote. It was a unanimous vote of the SEC.

PRYCE: Thank you.

Thank you, Mr. Chairman.

* * *

FRANK: The gentleman from Illinois.

May I just ask to the commissioners, I'm very grateful. I know we've been here three hours. We only have a few members who've been very faithful. And I think we can clean this up in about a half hour or so, if that's possible. And I'd very much appreciate your indulgence. And I think we want to be respectful of the members who stay.

The gentleman from Illinois. Thank you.

MANZULLO (?): Thank you, Mr. Chairman.

Long-time listener, first-time caller this afternoon. Mr. Chairman, this past week, I've been to two baseball games out at RFK. I saw the Nationals lose to the Detroit Tigers

last night – far more exciting game, the congressional game. And I paid a lot of attention to the umpires when they were there. And it strikes me that your demeanor today, transitioning from your role as a policymaker to your role now is really – you're calling balls and strikes.

And I noticed in the earlier conversation that you had with Mr. Kanjorski from Pennsylvania, your careful use of language. And I mean that respectfully – not parsing use of language, but careful use of language – how you characterize the American economy as robust and dynamic and so forth, and that you'd sign on to that characterization. But you also said hey, there's more opportunity for us to improve.

You also used that same admonition to the Congress about, well, let's make sure that there's a sense of equity between public company taxation and private company taxation or private equity taxation. And of course people like me, we all tend to hear in your words what we want to hear. And I think that you'll probably see quotations later on about how we've interpreted what you've said in different debates. And in the months to come we'll all recollect, well, we had Chairman Cox here. And he said – and we'll have different recollections of that.

But one of the things that is interesting to me is your high view of what you didn't say, but I think is the doctrine of stare decisis and your decision to move forward with the request in the Stoneridge case, to move forward with the amicus brief request and so forth. Can you just give me your thinking on that? Was that a decision that was, look, I've got this new role. And stability is very, very important here. And I understand that thinking. Or, alternatively, do you believe first and foremost that animating the plaintiffs' bar in this

class action type of environment helps the SEC to do its enforcement? Or is there some rationale in between there?

COX: Well first, thank you for your compliment. And I think your interpretation of what I've been attempting to get across here today is fairly accurate, including the priority that I place on predictability in rulemaking and enforcement from Securities and Exchange Commission. I think it is absolutely vitally important that our actions be noble in advance. Otherwise, there is not law, but something else – a lot of government power being exercised arbitrarily.

I don't think that there's anywhere where it could be more important for there to be predictability and clarity in rulemaking than when it comes to our capital markets, because so much is at stake that people have to make big bets on whether or not what they're doing is the right thing to do. And then they got it wind up the right way. So I think we do a great disservice when we are anything but clear and predictable, rule-based and law-based.

Now, that's not to say that this was an easy case, or that there was an automatic outcome. I think you also put your finger on the fact that sometimes getting it right means undoing what you've done once before. And so I did not reflexively follow the unanimous decision of 2004, but rather looked carefully at what was before me.

The staff recommended that the Commission request the solicitor general's office to file an amicus curiae brief, as you know, in support of the plaintiffs in Stoneridge. The Commission, on May 29 and 30, voted – because we have a seriatim process; it occurred over two days – voted to approve that recommendation. I think it is probably not

well-known that there were two parts to that recommendation in support of the plaintiffs. And on one point, the Commission was unanimous.

So I think all of us paid a great deal of attention to, as you put it, stare decisis. And all of us also paid a good deal of attention to whether or not we had it exactly right. We came out slightly differently as commissioners – well exactly opposite in the end. Although these are closer calls than, as you know, when you push the red button and green button, you're completely one way. That doesn't mean it's always easy. But I think everyone here, whichever way they decided that case – and they're all here, so you can ask them – but I think everyone here is concerned that litigation be used to proper ends; and that we to open a Pandora's Box and so on. What is going on in that case, though is that we are focused on when conduct is fraudulent, and whether conduct can be fraudulent. The commissioners believe it can. And also the circumstances of a particular case and whether or not that case should go forward.

So I hope that provides a little bit more context to . . .

FRANK: Mr. Manzullo (ph), I just would add, the gentleman commented on the precision of the chairman's language. Those of us who served with him can tell you that there was nothing new about his being very precise in his language. We remember similar precision when he was here; probably because when he was here, precision in language stood out by contrast.

The gentleman from North Carolina.

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